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No. 83-1285

In the Supreme Court of the United States

OCTOBER TERM, 1983

JANICE FITZGERALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a warrant authorizing the search of petitioner's residence for indicia of her association with the Hells Angels violated the First Amendment.

2. Whether the seizure of firearms discovered in plain view during the search of petitioner's residence violated the Fourth Amendment, where the search was conducted pursuant to a search warrant that, in part, did not satisfy the Fourth Amendment's particularity requirement.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A32) is reported at 724 F.2d 633. The opinion of the panel of the court of appeals that decided this case initially is reported at 705 F.2d 293.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 7, 1983. The petition for a writ of certiorari was filed on February 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1). She was sentenced to two years' imprisonment. A panel of the court of appeals reversed petitioner's

conviction. *United States* v. *Apker*, 705 F.2d 293 (8th Cir. 1983).[1] Thereafter, the court of appeals granted the government's petition for rehearing en banc, overturned the panel's decision, and affirmed petitioner's conviction (Pet. App. A1-A32).

1. The pertinent facts are summarized in the opinion of the en banc court of appeals (Pet. App. A2-A5). On February 18, 1981, a grand jury in the District of Nebraska returned an indictment against petitioner and nine other persons alleging that they were members or associates of the Hells Angels of Omaha and that, as such, they were involved in a conspiracy to distribute methamphetamine and to gain a monopoly on the methamphetamine traffic in Omaha, using threats, beatings, torture, and murder against their competitors. After the indictment was returned, federal authorities obtained arrest warrants for each of the defendants named in the indictment and "indicia search warrants" for premises alleged to be the residences of some of the defendants. The search warrants authorized the seizure of indicia of membership in the Hells Angels, including jackets with the Hells Angels insignia; belt buckles and T-shirts with "Hells Angels" printed on them; plaques, mirrors and "other items" giving the names of Hells Angels members; photographs depicting Hells Angels members; telephone books listing the telephone numbers of Hells Angels members; and certain papers and records relating to the Hells Angels (Pet. App. A3-A4 n.2).

On February 28, 1981, teams of federal and state law enforcement officers executed the arrest and search warrants. At petitioner's residence, the officers seized a Hells

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[1]The panel, however, upheld the convictions of three of petitioner's co-defendants, and this Court denied their petition for a writ of certiorari (No. 83-600 (Jan. 23, 1984)).

Angels T-shirt, a Hells Angels poster, Hells Angels medallions, a mirror bearing a Hells Angels sticker, a large number of photographs and photograph albums, a telephone directory, and various documents. In addition, they seized three firearms: a shotgun found in a case resting against the wall of a bedroom closet; a pistol found in the pocket of a woman's coat hanging in the closet; and a rifle found behind a dresser drawer. Pet. App. A4-A5.

2. The panel of the court of appeals that initially considered this case rejected the argument of petitioner and three co-defendants—Apker, Davenport, and Gearhart—that the search warrants infringed their First Amendment right of association (705 F.2d at 305-306). The panel nevertheless took cognizance of the First Amendment interests involved by invoking a "scrupulous exactitude" standard for judging the validity of the search warrants under the Fourth Amendment (*id.* at 300-301). Applying that standard, the panel held that the indicia warrants were invalid insofar as they failed sufficiently to particularize certain of the items to be seized, namely, the telephone books, papers, and "other items" (*id.* at 302-303).

Although it ruled that the indicia warrants were invalid, the panel upheld the admissibility of firearms found at the residence of co-defendants Apker, Davenport, and Gearhart under the inevitable discovery doctrine (705 F.2d at 306-307).[2] The panel refused, however, to apply the inevitable discovery doctrine to the firearms found at petitioner's residence (*id.* at 307). Stating that no drugs or other

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[2]The panel reasoned that the officers had observed drugs in plain view while conducting protective "sweep searches" pursuant to execution of the valid federal *arrest* warrants, that the officers' observations during the sweep searches led them to seek state search warrants to look for more drugs, and that they inevitably would have found the firearms while executing the state search warrants (705 F.2d at 306-307).

evidence of crime had been found during the sweep search of petitioner's residence, and that the officers therefore did not obtain a state search warrant for her residence (see page 3 note 2, *supra*), the panel reasoned that the firearms seized there were found only by virtue of the overbroad federal indicia warrant (705 F.2d at 306, 307).

A majority of the panel also rejected the government's argument that it should sever any unlawfully general parts of the indicia warrant and uphold the admissibility of the firearms found at petitioner's residence on the basis that the officers observed them in plain view while executing the specific parts of the warrant (705 F.2d at 307-308). Recognizing that a number of courts have approved severance, so as to permit the admission of items seized pursuant to the valid portions of a warrant rather than excluding all evidence seized under the warrant, the panel nevertheless concluded that severance was inappropriate here because the government was not seeking to admit items that had been specifically identified in the valid portions of the warrant, but was instead relying on the valid portions of the warrant as a basis for the admission of other items (the firearms) found in plain view while executing the valid portions of the warrant (*ibid.*). Judge Bright, concurring in part and dissenting in part, would have adopted the "plain view-severance" approach to affirm petitioner's conviction (*id.* at 310).

3. On rehearing en banc in petitioner's case, the court of appeals adopted Judge Bright's approach of severing the valid portions of the indicia warrant from the impermissibly general portions and concluded that the weapons were found at petitioner's residence while the officers were executing the valid portions of the warrant (Pet. App. A1-A32). In all other respects, the en banc court of appeals left the opinion of the panel undisturbed (*id.* at A2).

A majority of the en banc court concluded that all three weapons found in petitioner's residence were properly discovered during execution of the valid portions of the indicia warrant (Pet. App. A21). Judge Bright, writing for himself and Chief Judge Lay, took the view that only the shotgun found resting against the wall of the bedroom closet was in a place where the officers, under the valid portions of the warrant, clearly had a right to search (*id.* at A13-A14). Nevertheless, Judge Bright agreed that petitioner's conviction should be affirmed "because possession of one weapon is enough to support a conviction under [18 U.S.C. App.] § 1202(a)(1)" (Pet. App. A14). Moreover, Judge Bright concluded that, in the context of this case, "the trial court's admission of the [other two weapons] into evidence must be deemed harmless error" (*ibid.*).

Senior Judge Floyd R. Gibson concurred in the result, but he would have affirmed petitioner's conviction under the inevitable discovery doctrine (Pet. App. A15-A21). Judges Heaney and McMillian dissented, believing that the search of petitioner's residence pursuant to the indicia warrant was in reality a pretext for a general search for any evidence of crime (*id.* at A23-A32).

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the warrant authorizing the search of her residence for indicia of her association with the Hells Angels violated her First Amendment right of association. The court of appeals correctly rejected this claim.

It is well settled that search warrants are not altogether forbidden merely because First Amendment interests might be implicated; rather, "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' " *Zurcher* v. *Stanford Daily*,

436 U.S. 547, 564 (1978) (quoting *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965)). The panel of the court of appeals applied precisely that standard (705 F.2d at 300-301)[3] and correctly determined that the indicia warrants were sufficiently particularized with respect to the items of clothing, mirrors, plaques and photographs (*id.* at 302-303).

Petitioner argues (Pet. 11-12), however, that absent any allegation that an organization is wholly illegitimate, the government has no lawful interest in seizing evidence of mere association. But the panel of the court of appeals correctly concluded (705 F.2d at 298) that evidence of petitioner's association with the Hells Angels would be probative in this case in that it "would help show [defendants'] associations with each other and their opportunity to use the Hells Angels organization for illegal activities." The court's ruling is thus consistent with the "mere evidence" rule established in *Warden* v. *Hayden*, 387 U.S. 294, 307 (1967); that is, proof of petitioner's association with the Hells Angels, while not itself evidence of crime, would *aid* in establishing petitioner's guilt of the charges of conspiring to use the Hells Angels to control the methamphetamine traffic in Omaha.[4]

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[3]The en banc court of appeals left this aspect of the panel's decision undisturbed (Pet. App. A2). Nevertheless, a majority of the en banc court expressed considerable doubt about the applicability of the First Amendment to petitioner's association with the Hells Angels (*id.* at A21-A23).

[4]It is true, as petitioner contends (Pet. 11-12), that the Ninth Circuit has stated that "where there is no allegation that the enterprise is wholly illegitimate * * *, evidence of mere association would not necessarily aid in obtaining a conviction." *United States* v. *Rubio*, No. 80-1577 (9th Cir. Dec. 20, 1983), slip op. 11, modified (Feb. 6, 1984). (Petitioner has cited (Pet. 12) to the original panel opinion in *Rubio*, which was published in the advance sheets at 703 F.2d 1124 (1983), but was withdrawn pending a decision on the government's petition for rehearing en banc. On December 20, 1983, the Ninth Circuit denied the government's petition, but the panel substituted new opinions that are

Accordingly, the government had a compelling law enforcement interest in seizing the indicia evidence. See *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 90-105 (1961); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 75-77 (1928). By the same token, any impingement on petitioner's associational rights resulting from seizure of the indicia evidence was negligible in view of the fact that Hells Angels members and associates, by their dress, customarily publicly identify themselves as such and therefore would not be harmed by the disclosure of their membership or association. In these circumstances, petitioner has failed to make out a sound First Amendment claim requiring invalidation of the parts of the warrant authorizing a search for clothing, mirrors, plaques, and photographs indicative of membership in or association with the Hells Angels.

United States v. *Rubio*, No. 80-1577 (9th Cir. Dec. 20, 1983), modified (Feb. 6, 1984), does not support petitioner's First Amendment claim. On the contrary, the court in *Rubio* stated (slip op. 5-6) that "[w]e strongly disagree with

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not yet reported. The sentence relied upon by petitioner was not altered in the new majority opinion.) In our view, the Ninth Circuit's observation is plainly wrong; it seems quite obvious that in a RICO prosecution, where the charge is conducting or participating in the affairs of an enterprise through a pattern of racketeering, the government must prove, inter alia, the defendant's connection with the enterprise. Thus, evidence of association clearly would "aid" in obtaining a conviction; indeed, it is a necessary element of the prosecution's case. In any event, the sentence in *Rubio* relied upon by petitioner is insufficient to create a conflict requiring this Court's resolution. The court in *Rubio* went on to hold that evidence of association with the Hells Angels, even assuming that the organization is not wholly illegitimate, could lawfully be seized if the affidavit in support of the indicia warrant "provide[d] probable cause to believe that the suspect has conducted the affairs of the enterprise, at least in part, through a pattern of racketeering activity." *Rubio*, slip op. 12. The court below, in the panel opinion, found that this requirement had been satisfied (705 F.2d at 303). See also note 5, *infra*.

any inference that criminal investigation is somehow prohibited when it interferes with * * * First Amendment interests [of association]." Instead, the court held (*id.* at 6) that "[w]hen activity protected by the First Amendment becomes the subject of a criminal investigation, the protections afforded by the Fourth Amendment come into play." This is the same approach adopted by the court of appeals in the instant case.[5] This Court did not see fit to grant review of the identical issue when it was raised by petitioner's co-defendants (83-600 Pet. 11-15), and there is no greater reason to do so now.

2. In upholding the seizure of the firearms from petitioner's residence, the en banc court severed the invalid portions of the search warrant and concluded that the firearms would have been found in plain view pursuant to a legitimate execution of the valid portions of the warrant. Petitioner does not question that the firearms would have been found in plain view during the search for the sufficiently particularized items; rather, she challenges the validity of

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[5]The *Rubio* court reached a contrary result to that here not on the general First Amendment principles argued by petitioner, but on the narrower question whether the indicia warrants (which were virtually identical to that in the present case) were based on probable cause. The *Rubio* court held that they were not, finding no nexus between the indicia of association in the Hells Angels and the alleged RICO violations. Here, however, the court of appeals panel, relying on the indictment against petitioner that had been incorporated by reference into the warrant application, determined that there was a sufficient showing that the indicia of association with the Hells Angels would aid in securing petitioner's conviction on the charge of conspiring to use the Hells Angels to control the methamphetamine traffic in Omaha. By contrast, in *Rubio* the court refused to permit the magistrate to consider the indictment in deciding whether there was probable cause. But see *United States* v. *Seybold*, No. 83-1073 (9th Cir. Feb. 3, 1984), slip op. 550-551. To the extent that *Rubio* and the decision below differ on the use to be made of the indictment, *Rubio* appears to have been superseded by *Seybold*, and, in any event, petitioner does not seek review of the issue here.

the "plain view-severance" approach per se on the ground that it will facilitate pretextual searches (Pet. 21). This claim is without merit.

The courts of appeals have repeatedly held that the unlawfully general portions of a search warrant may be severed from so much of the warrant as satisfies the particularity requirement and that items seized pursuant to the lawful portions of the warrant need not be suppressed. See *United States* v. *Riggs*, 690 F.2d 298 (1st Cir. 1982); *United States* v. *Christine*, 687 F.2d 749 (3d Cir. 1982); *United States* v. *Cardwell*, 680 F.2d 75 (9th Cir. 1982); *United States* v. *Cook*, 657 F.2d 730 (5th Cir. 1981). See also 2 W. LaFave, *Search and Seizure* § 4.6(f), at 111-112 (1978 (& Supp. 1984)). As a matter of logic, there is no reason not to apply the severance rule to evidence discovered in plain view pursuant to execution of the valid portions of a warrant. See *United States* v. *Freeman*, 685 F.2d 942, 952-953 (5th Cir. 1982) (applying the "plain view-severance" approach); 2 W. LaFave, *supra*, § 4.6(f), at 112-113. The controlling principle must be whether the officer had a right to be searching in the locations that yielded the plain-view evidence, a standard that was met here.

Petitioner's concern that the decision below will facilitate pretextual searches is not justified. Under the "plain view-severance" approach, items found in plain view during execution of the invalid portions of an otherwise valid warrant presumably would be suppressed. Moreover, nothing in the court's en banc decision in any way relieves the government of the obligation to establish probable cause to conduct a search or to execute the search in a manner consistent with the authorization provided in the warrant. As Judge Bright correctly observed (Pet. App. A12), careful adherence to these and other Fourth Amendment requirements pertaining to the issuance and execution of search warrants "will

afford full protection to individual rights."[6] In short, there is no basis for departing from the well-settled severance rule in this case.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Insofar as petitioner contends (Pet. 19-21) that the search in *this* case was pretextual in nature, that claim has been rejected explicitly or implicitly by the district court, the court of appeals panel, and the en banc court of appeals. Further review by this Court of such a fact-bound contention is not warranted.

[7]In addition to the claims already discussed, petitioner apparently also challenges the panel's invocation of the inevitable discovery doctrine to uphold the convictions of her co-defendants (Pet. 14-17). Clearly, however, she lacks standing to do so. While we agree with Judge Gibson (Pet. App. A15-A21) that the inevitable discovery doctrine provides a valid, alternative basis for sustaining the admission of the firearms at petitioner's trial, there is no occasion here to address the issue. The en banc majority affirmed petitioner's conviction on an entirely different theory (plain view-severance), and its decision, as we have shown, was correct.

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